United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

CORRECTED COPY

76-1464

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

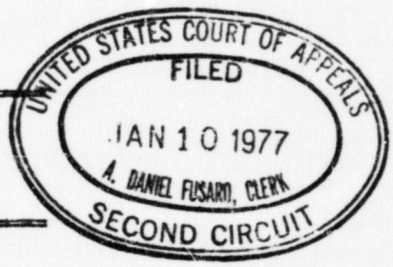
-against-

COSME A. CACERES, LEOPOLD LOZANO, and JOSE A. LIRIANO,

Defendants-Appellants.

Docket No. 76-1464

P/S



BRIEF FOR APPELLANT
COSME A. CACERES

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
COSME A. CACERES
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel.

CONTENTS

TABLE OF CASES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -against- COSME A. CACERES, LEOPOLD LOZANO, and JOSE A. LIRIANO, Defendants-Appellants.	Docket No. 76-1464

BRIEF FOR APPELLANT COSME A. CACERES

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether the Judge's instruction that a defendant intends the natural and probable consequences of his acts is reversible error.

2. Whether the destruction by Secret Service Agent Quinn of his notes on Caceres' statement is reversible error.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable Henry Bramwell) rendered on September 17, 1976, after a trial before a jury, convicting appellant Cosme A. Caceres of four counts of uttering forged Federal Reserve notes, two counts of possession of the notes, and one count of conspiring to do the same (18 U.S.C. §§371, 472, 2), and sentencing him pursuant to 18 U.S.C. §3651 to imprisonment for three years on Count One, four months to be served in a jail-type institution with execution of the remainder of sentence suspended, and a three-year term of probation imposed. Imposition of sentence on the remaining counts was suspended. A special condition of probation was imposed: if Caceres is deported, he may not re-enter the United States during his probationary period except at the request of the Attorney General or the court.

Statement of Facts

Appellant Caceres, with Leopold Lozano and Jose Liriano, were charged in an eight-count indictment.[1] Four counts of

---

[1]The indictment is "B" to the separate appendix to appellant Caceres' brief.

the indictment alleged the uttering of counterfeit Federal Reserve notes at the Sip 'n Smoke Shop (Count I), Walken's Bakery (Count II), Leo Pete Grocery (Count III), and Pasticceria La Torre (Count IV). The fifth count charged possession of six counterfeit $20 bills and one $50 bill with intent to defraud. The Government's theory was that these notes were in the car in which the three appellants were arrested.[2] The seventh count charged that appellant Caceres possessed a $20 counterfeit note, and the final count charged the three men with conspiracy.[3]

In support of the charges, the Government introduced into evidence several $20 and two $50 bills which Secret Service Agent Philip Smith testified were counterfeit. Smith stated that the counterfeit nature of the bills was shown by the fact that they were printed on incorrect paper, that all of the bills of the same denomination had the same serial number,[4] that the two serial letters on each bill, reflecting the Federal Reserve bank which distributed the bills, were different (6/9 at 35-38[5]). The remainder of the Government's

---

[2]Five of these were found in a paper bag 250 feet from the car; no witness could place the bag in the car.

[3]Liriano alone was charged in Count VI with possession of a counterfeit $50 bill.

[4]The $20 bills all bore serial number F67631889A. The $50 bills bore serial number B31985757A.

[5]Numerals in parentheses refer to pages of the transcript of the proceeding held on the date indicated.

evidence was directed toward establishing a connection between the three appellants and the counterfeit bills.

Richard Simmons testified that he was part-owner of the Sit 'n Smoke Shop on Broadway in Astoria, Queens. During the evening of October 31, 1975 (23-24) a black man wearing dark slacks and a plaid jacket entered the store. Since Simmons was having coffee at the time, he did not pay much attention to the man, but when Simmons' partner displayed a $20 bill with which the man had paid for his purchase, Simmons thought the bill was "bad" (29). Simmons returned the bill to his partner and did not see it again. The bill was not introduced into evidence.

Simmons left the store and drove around in his car, looking for the man. Simmons saw the man in the grocery store (6/7 at 30) doing something across a counter (6/7 at 32. Peter Kardasis, who works at Leo Pete Grocery, testified that at about 7:00 P.M., a dark-skinned man paid him for cigarettes with a $20 bill and that there was a $20 bill already in the cash register (6/8 at 4-13) (GX-3). These two bills were counterfeit (6/9 at 30, 33-34).

Simmons then saw the man leave the grocery and get into the back seat of a green car in which two dark-skinned men were already sitting (6/7 at 31-32, 64). Simmons noted the license number of the car, which was 902KXLL (6/7 at 34, 77), and followed the car down Broadway. He saw the man, a bill in his hand, wave toward a candy store (6/7 at 33-34). The man

then pointed toward a bakery, La Pasticceria, and went into the store (6/7 at 34).

Simmons then found a policeman, Thomas Gaffney (6/8 at 26), and told him what had occurred (6/7 at 35). Gaffney followed Simmons to the bakery (6/7 at 36; 6/8 at 28). At the bakery, Joesphine Polizzi, an employee, gave Gaffney a $20 bill[6] (6/8 at 23; 28-29), who took it across the street to a bank where the manager examined it (6/8 at 29). Simmons then told the police the license number of the car and gave the best description he could (6/7 at 37-38).

Gaffney looked for the car, found it, and stopped it (6/8 at 32).

While Gaffney was handcuffing the three men in the car, a crowd gathered. Several boys ran down the street with a brown paper bag, which Gaffney recovered about 250 feet from the car. The bag contained five counterfeit $20 bills (6/8 at 32; 6/9 at 34; GX-5, 6). No one testified that the bag came from the car.

Gaffney found a second bag in the car (GX-7). This bag contained money (6/8 at 38-40).

The three men -- the three appellants here -- and the car were taken into custody (6/8 at 43-45). In Liriano's possession was found a counterfeit $50 bill (GX-9; 6/8 at 48-49; 6/9 at 34); in appellant Caceres' wallet was found a $20 bill (6/8

---

[6]Ms. Polizzi testified that a $20 bill had been given to her for the purchase of some cookies and that she had put it in the cash register (6/8 at 23). Ms. Polizzi could not describe the person who gave her the bill. This bill, introduced as GX-4, bore the serial number F67681889 (6/8 at 22).

at 50, 52; 6/9 at 34; GX-10).

Gaffney testified that Caceres said after the arrest that the money had been left in his gypsy cab and that he learned from a friend two weeks later that the money was bad (6/8 at 54).

Later that night, the three appellants were turned over to the custody of the Secret Service agents. Agent Charles J. Quinn took a statement from Caceres (GX-14), which Quinn wrote and Caceres signed (6/8 at 92). Quinn testified:

> Q [by counsel for Caceres]: Now this affidavit was signed by Mr. Caceres. You said it was written in your handwriting, is that correct?
>
> A [by Quinn]: I printed it, yes Ma'am.
>
> Q Did you print this from a rough draft or did you print this from the top of your head?
>
> A No, as I interviewed Mr. Caceres I asked him questions and he made his statement. I wrote notes on a piece of paper recording his answer to certain questions things that he said and as we went over the things several times I made additional notes until I was satisfied that we had the entire story that he was going to tell.
>
> And at that time I then while asking him various questions and reading from my prior notes, I then printed that statement up.
>
> (6/8 at 98).

He also testified that he destroyed these notes (6/8 at 98).

In the statement, Caceres stated that he got Lozano and Liriano to help him pass counterfeit bills on a promise to split the proceeds.

Liriano also gave a statement, acknowledging that he drove the car.

An inventory search was conducted after the car was seized, and in the ashtray was found one $50 and one $20 counterfeit bill, as well as several genuine bills (6/9 at 34; GX-19).

Also testifying was Eva Walken, who said that at about 7:00 p.m. on October 31, 1975, she found in the cash register of her bakery a $20 bill which she sent to the Secret Service (6/8 at 82-84). The bill was counterfeit and became GX-11 (6/9 at 32, 35).

All three appellants testified. Caceres testified that he was on Broadway shopping both for furniture for his new baby and for a Halloween party, that he did not know the bills were counterfeit, that the statement was not true, and that he signed the statement because he was told that if he did not cooperate he would get 30 to 40 years in jail (6/9 at 78-89, 104).

Lozano and Liriano testified that they had no knowledge of the counterfeit nature of the bills.

In his charge to the jury,[7] Judge Bramwell instructed on wilfullness and intent 13 times (6/14 at 124, twice; 125, 129, 130, 131, 132, 140, 143, 148, 150, 151, 154-155). In a dozen instances, the judge stated, with minor variations:

---

[7]The complete charge is "C" to the separate appendix to the brief for appellant Caceres.

> Participation is willful if done voluntarily and intentionally and with the specific intent to do something the law forbids or with the specific intent to fail to do something the law requires to be done, that is to say, with bad purpose either to disobey or to disregard the law.
>
> (Appendix C at 124).

To define the specific intent to defraud, the court charged:

> To act with intent to defraud means to act willfully and with the specific intent to deceive or cheat, ordinarily, for the purpose of either causing some financial loss to another or bringing some financial gain to oneself. However, the evidence in the case need not establish that the United States or any person was actually defrauded. but only that the accused acted with the intent to defraud.
>
> (Appendix C at 149).

As to how this specific intent might be proved, the court stated:

> An act is done knowingly if it is done voluntarily and intentionally and not because of misunderstanding or accident or other innocent reasons. Whether something is done knowingly involves a state of mind, but a state of mind, like other facts, can be determined from the evidence and from inferences from the evidence.
>
> (Appendix C at 143).

Then the court stated:

> To establish specific intent, the government must prove that a defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.
>
> Intent ordinarily may not be proved directly, because there is no way of fathom-

ing or scrutinizing the operations of the human mind, but you may infer the defendants' intent from the surrounding circumstances. You may consider any statement made and act done or omitted by a defendant and all other facts and circumstances in evidence which indicate his state of mind.

It is ordinarily reasonable to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

(Appendix C at 150-151).

Again, the court presented the same idea:

Knowledge and intent exist in the mind. Since it is not possible to look into a man's mind to see what went on, the only way you have for arriving at a decision in these questions is for you to take into consideration all the facts and circumstances shown by the evidence, including the exhibits, and to determine from all such facts and circumstances whether the requisite knowledge and intent were present at the time in question.

Direct proof is unnecessary.

Knowledge and intent may be inferred from all the surrounding circumstances. As far as intent is concerned, you are instructed that a person is presumed to intend the natural and probable or ordinary consequences of his acts. You must find beyond a reasonable doubt from all the evidence that the defendants knew at the time that they possessed or uttered the counterfeited money that the bills were in fact counterfeit.

(Appendix C at 154-155).

After deliberations, the jury found the defendants guilty as charged.[8]

---

[8]Prior to trial, a hearing was held on the defense motion to suppress evidence seized after an illegal arrest. Testimony of the hearing is summarized in the briefs of co-appellants Liriano and Lozano.

ARGUMENT

Point I

THE JUDGE'S INSTRUCTION THAT A DEFENDANT INTENDS THE NATURAL AND PROBABLE CONSEQUENCES OF HIS ACTS IS REVERSIBLE ERROR.

Appellant was charged with possessing and uttering counterfeit United States currency, offenses requiring the specific intent to defraud. United States v. Wilkerson, 469 F.2d 963, 969 (5th Cir. 1972); United States v. Provenzano, 171 Fed. 676, 676-677 (S.D.N.Y. 1909). He was also charged with conspiracy to utter counterfeit bills, requiring the identical specific intent. See Ingram v. United States, 360 U.S. 672, 678 (1959). Despite the fact, as the jurors were unequivocally instructed, that specific intent was an element of the crimes charged, the court erroneously instructed the jurors on two occasions as to how that intent might be proved, saying that it was "ordinarily reasonable to infer that a person intends the natural and probable consequences of acts knowingly done...." Where specific intent is required, this instruction is irreconcilably in conflict with proof of that element, and is plain error requiring reversal. United States v. Robinson, Doc. No. 76-1214, slip op. 445, 451-454 (2d Cir., November 10, 1976); see United States v. Bertolotti, 529 F.2d 149, 159 (2d Cir. 1975); United States v. Barash, 365 F.2d 395, 402-403 (2d Cir. 1966).

The danger of the charge is that it enables the jurors to

find the specific intent from proof of uttering alone. See United States v. Barash, supra, 365 F.2d at 402. Further, since the erroneous instruction appears in the same portions of the charge that advise that intent may be inferred from all the facts and circumstances, the jurors had before them, at best, two conflicting instructions on how intent to defraud may be proved. At worst, they were instructed that in this case, the broader rule is limited by the applicability of the narrower one.[9] Since the charge itself, when viewed as a whole, does not cure the error (United States v. Park, 421 U.S. 658 (1975); see also Cupp v. Naughten, 414 U.S. 141 (1973)), the erroneous charge is as substantial a mistake as it would be if it were the only instruction given on the manner of proving the element of specific intent. United States v. Robinson, supra, slip op. at 454.

---

[9] This structuring of the charge makes United States v. Erb, Doc. No. 76-1143, slip op. 49, 65 (2d Cir., October 1, 1976), inapplicable. In Erb, the judge instructed the jury on the issue of intent so as to make that element clear.

Point II

THE DESTRUCTION BY AGENT QUINN OF HIS NOTES ON CACERES' STATEMENT WAS REVERSIBLE ERROR.

During the course of Secret Service Agent Quinn's testimony he described how he took down appellant Caceres' post-arrest statement. Quinn explained that he asked questions, made notes on certain of Caceres' responses, and when he got the whole story Caceres was going to tell, wrote the statement. Then he destroyed his notes.

The destruction of the notes, in the context of Caceres' challenge to the accuracy and completeness of the statement as it was introduced at trial, is reversible error. See United States v. Harris, ___ F.2d ___ (9th Cir. Doc. No. 76-1317, September 23, 1976); United States v. Johnson, 525 F.2d 999 (2d Cir. 1975),[10] cert. denied, ___ U.S. ___ ( ); United States v. Harrison, 524 F.2d 421 (D.C. Cir. 1975); United States v. Johnson, 521 F.2d 1318 (9th Cir. 1975).

The notes taken by Quinn were possible Jencks Act (18 U.S.C. §3500) material, or discoverable under Rule 16(1)(A) of the Federal Rules of Criminal Procedure, or may have been material properly given to the defense under Brady v. Maryland, 373 U.S. 83 (1963). As the Court wrote in United States v. Harrison, supra, 524 F.2d at 427-428:

---

[10] To the extent that United States v. Terrell, 474 F.2d 872, 877 (2d Cir. 1973), is inconsistent, it is overruled by Johnson.

> It seems to plain for argument that rough notes from any witness interview could prove to be Brady material. Whether or not the prosecution uses the witness at trial, the notes could contain substantive information or leads which would be of use to the defendants on the merits of the case. If the witness does testify, the notes might reveal a discrepancy between his testimony on the stand and his story at a time when the events were fresh in his mind. The discrepancy would obviously be important for use in impeaching the witness' credibility. The possible importance of the rough notes for these purposes is not diminished in cases where the prosecutor turns over to the defense the 302 reports. The 302 reports contain the agent's narrative account of the witness's statement, prepared partly from the rough notes and partly from the agent's recollection of the interview. Although the agents are trained to include all the pertinent information in the 302 report, there is clearly room for misunderstanding or outright error whenever there is a transfer of information in this manner. In the best of good faith, the statement as recorded in the 302 report may, to some degree at least, reflect the input of the agent. In such a situation, the information contained in the rough notes taken from the witness himself might be more credible and more favorable to the defendant's position.
>
> (Footnotes omitted).

The notes may well have shown that in rewriting the post-arrest statement, Quinn changed its contents and meaning. Indeed, appellant Caceres testified on direct examination that there was information in the statement that he had not given to Quinn (6/9 at 99) and that many parts of the statement were not true (6/9 at 94-101).

Appellant Caceres' challenge to the statement as it was introduced into evidence was sufficient to make Quinn's notes

important to the defense and to prevent it from being harmless error. Quinn's destruction of the notes requires reversal of the judgment and a new trial at which the Government will not be permitted to use the confession.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the case remanded for a new trial.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
COSME A. CACERES
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel.

CERTIFICATE OF SERVICE

January 10, 1977

I certify that a corrected copy of this brief [redacted] has been mailed to the United States Attorney for the Eastern District of New York.